



7th JMT Legal Assistance Information

Child Custody and Visitation Overseas

Please note that this Information Paper only provides basic information and is not intended to serve as a substitute for personal consultations with a Legal Assistance Attorney.

INTRODUCTION: We prepared this handout with frequently asked questions on issues involving custody, visitation, passports, court orders and international custody matters. It is, of course, very general in nature. We ask that you read over these questions and answers carefully in connection with your visit to our legal assistance attorneys so that you may have the fullest information available to help you with your family law problem.

1. Q. MY HUSBAND AND I ARE SEPARATING. HOW DO CUSTODY AND VISITATION GET DECIDED? WHAT'S THE BEST SOLUTION?

A. If the two of you are able to reach agreement on the terms for child custody and visitation, then you should set them out in a separation agreement. The more specific the terms of your agreement, the better and easier it will be (ordinarily) to enforce. If you and the other parent cannot agree, then it will be up to the courts to decide the issues of child custody and visitation.

2. Q. WHAT COURT DECIDES CHILD CUSTODY AND VISITATION?

A. If the child is living overseas, these issues can be determined by the courts in the country where he or she resides. However, if the child is not a citizen or permanent resident of that country, most of the time it is a court in the United States that decides the issues of custody and visitation, and this usually occurs when the child involved is living within the state where the lawsuit for custody or visitation is filed. When the child is located in the United States, the proper place to file the suit would be in the county where the child is located. When it's necessary to do so overseas, you may file suit in the country where the child is located.

3. Q. CAN A LEGAL ASSISTANCE ATTORNEY HELP ME FILE A LAWSUIT FOR CHILD SUPPORT?

A. No-- Our legal assistance attorneys can help you contact a soldier's commander about nonsupport, but they cannot start a court action for you. You will have to hire a civilian attorney for that. We can, of course, help you find an attorney to help you obtain child custody.

4. Q. DO MOTHERS AUTOMATICALLY GET CUSTODY OF THEIR CHILDREN WHEN A SEPARATION OCCURS?

A. The courts of most states do not establish an "automatic" preference for either mother or father, but they do look very closely at which parent will best promote the welfare and interests of the child(ren) of the couple.

5. Q. WHAT FACTORS DO THE COURTS CONSIDER IN GRANTING CUSTODY?

A. They usually look at who has primarily taken care of the child during the marriage (washing, feeding, and clothing the child, for example, or helping the child with homework), who has the best approach to discipline, who has cared for the child since separation (if the couple has already separated), what work schedules either or both parents have, and how each parent can provide for the physical, emotional, educational, religious, and social needs of the child.

6. Q. CAN I FILE FOR CUSTODY IN GERMANY?

A. You certainly can ask the courts in the country where you or your spouse are stationed to grant you custody of your son or daughter if he or she is living in that country. In almost all cases the physical presence of the child within the court's jurisdiction (i.e., in the area served by the court) is essential to consideration of a custody claim. If you do so, then the courts of that country (Germany, for example) will decide "which parent has the right to determine the whereabouts of the child," which is what custody is all about. *But*, you probably shouldn't file there if you want to have the courts of the U.S. enforce your custody decree. This is because, except in unusual situations, such as when a child is physically in danger, the resulting foreign court order is not binding on the courts back in the United States. If you or your spouse will be returning to the U.S., you will in all likelihood have to go to court again to ask for custody in the county where the child is living since no law requires a state court judge to recognize or obey another nation's court order for custody (just as no law compels a Korean or Italian judge to honor an American custody order).

7. Q. BUT IF I GET A U.S. CUSTODY ORDER, WON'T I HAVE TO GO THROUGH THE SAME ROUTINE WHENEVER I'M ASSIGNED TO A NEW DUTY STATION IN A DIFFERENT STATE?

A. No. Under the provisions of the Parental Kidnapping Prevention Act, a federal law, and also of the Uniform Child Custody Jurisdiction Act, a law passed by all 50 states, each state is **required** to recognize and honor the custody decrees of its sister states. The court must enforce the other state's custody order as if it were its own order. In addition, the above statutes require each state to set up a "custody order registry." This is a place where you can file or register the custody order you got in another state. That way, the courts in **State A**, where the child may be visiting a parent, will know that there is a custody order in **State B** giving the other parent legal custody of that child. Ask your legal assistance attorney about how to register one state's custody order in another state, or else contact a lawyer or assistant court clerk in the second state to find out how to do it.

8. Q. IF THE OTHER PARENT DOES NOT LIKE THE PRESENT CUSTODY ORDER, CAN HE OR SHE FILE FOR CUSTODY IN ANOTHER STATE?

A. Under the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, the court in a custody case must always inquire into whether the child or children have been the subject of custody litigation in any other state. When a judge finds that another court has made an award of custody, the judge should refuse to rule on the case. Only if the first court has released or transferred jurisdiction to the new state court may that court assume jurisdiction to hear the custody case (unless there is an immediate and clear emergency affecting the child's welfare).

9. Q. IF I WANT TO GET A CUSTODY ORDER IN THE OVERSEAS COUNTRY WHERE I'M STATIONED, WILL THE COURTS THERE ALLOW IT?

A. As a general rule, yes -- so long as two conditions are met—

- The child was physically present in that country when the court order was entered; and
- The child continues to be present in that country.

A judge will **usually** refuse to enter a custody ruling if the child is **somewhere else**, rather than within the court's jurisdiction (the area served by the court). Thus if the mother is stationed in Grafenwoehr but the father and their daughter are back in Ohio, the German courts are not likely to allow mom to proceed with a custody case in Germany. If, on the other hand, mom and her daughter were in Germany and mom wanted to file there for custody because of an emergency involving the father -- such as physical or sexual abuse, attempted kidnapping, substance abuse or domestic violence -- the courts there would probably allow it.

10. Q. WHAT IF I GET A CUSTODY ORDER IN THE STATES BUT I GET "UNACCOMPANIED" DEPLOYMENT ORDERS OVERSEAS. CAN'T I JUST LET MY FOLKS LOOK AFTER MY DAUGHTER TILL I GET BACK? DO I HAVE TO TELL MY EX-WIFE?

A. It depends. You can certainly let your parents care for your child (unless your custody order says otherwise). As for "telling your ex", you'll have to make that decision yourself. As a matter of fairness to the other parent of your child, you should advise her of this important change in circumstances. But the law says that you don't have to do this unless your court order requires it. If you assume that the other parent will not attempt to exercise visitation, will not try to phone and talk to your daughter, and won't find out about your absence in any other way, then you shouldn't have any reason for concern. You will need to weigh the pro's and the con's and try to make the right decision in this situation. You'll also have to think about how it will look to a judge later on if you withhold information of your departure just so that the other parent doesn't "get the child."

11. Q. BUT WHAT IF MY "EX" FINDS OUT I'M GONE? DOES THAT MEAN SHE CAN JUST TAKE MY DAUGHTER? THAT'S NOT FAIR!

A. First, let's remember that it's "our daughter" that's involved, not "my daughter." Unless your ex-wife's parental rights have been terminated by the court (or her visitation rights suspended), she has certain rights to see the child. And if there is a custody dispute, it will be up to the judge to decide "what's fair," not either of the parents. Your ex-wife will need a court order to get custody of your daughter if you leave. She will have to apply to the court for an order and, except in an emergency, she'll have to serve you with a copy of the motion or petition and a notice of hearing for the trial. As soon as you're served with legal papers, take them to the nearest legal assistance office so they can advise you on what to do.

12. Q. WHAT WILL THE COURT DO IF MY "EX" PETITIONS THE COURT FOR CUSTODY WHILE I'M DEPLOYED OVERSEAS?

A. It's impossible to tell. If you're only gone for a couple of weeks' TDY, there might not be a problem. If, on the other hand, you're sent to Korea for a year, the court is free to find that a substantial change in circumstances has occurred and award custody to someone else.

13. Q. CAN THE COURT AWARD ATTORNEY'S FEES TO ME IN A CUSTODY CASE?

A. Under the law of some states, if the person asking for attorney's fees is acting in good faith and is unable to afford the legal expenses of the lawsuit, it is possible (but not mandatory) for the court to award reasonable attorney's fees as part of the custody order. This is not the rule in every state, and you would need to check with your legal assistance attorney or civilian lawyer to find a specific answer to this question.

14. Q. ONCE IT'S FILED, CAN A CUSTODY ORDER BE CHANGED?

A. No custody order is ever *permanent*. However, once a parent is awarded custody in a court order, the judge can change the custody order only if there is a substantial change of circumstances affecting the best interest and welfare of the child or children.

15. Q. WILL MY SEPARATION AGREEMENT PROTECT ME FROM THE OTHER PARENT SNATCHING MY CHILD?

A. No. A separation agreement which hasn't been incorporated into a court order or divorce decree is **only a contract** between you and the other parent, not a court order. A court order is enforceable by contempt of court. Court orders of one state can be filed and registered in another state and thus be treated as if they were issued by the second state for purposes of enforcement. None of this applies to separation agreements which are not incorporated into a divorce decree. If, on the other hand, your separation agreement has been **incorporated into a court decree** in your home state, then it is a court order and is enforceable by contempt of court.

16. Q. IF MY SPOUSE IS GRANTED CUSTODY, WILL I GET VISITATION RIGHTS?

A. Ordinarily the noncustodial parent is entitled to reasonable visitation rights with a minor child except in extraordinary situations, such as when the noncustodial parent has a history of abusing the child. Visitation can be flexible and unstructured, assuming the parties can get along and agree on the times and terms of visitation, or it can be highly structured and rigid, with certain days and times set out with great specificity.

17. Q. WON'T CUSTODY BE SETTLED WHEN I OBTAIN A DIVORCE?

A. Divorce decrees do not necessarily settle custody matters. In some states, such as New York and Wisconsin, all issues concerning the marriage and separation -- custody, child support, visitation, etc. -- are handled at or before the divorce is granted. In other states, such as North Carolina and Delaware, the divorce is handled separate from these issues, and a custody or visitation order can be entered before or after a final decree of divorce or dissolution. In any event, remember that you must file a request with the court (sometimes called a complaint, petition, or motion) to get the court to consider the issue of child custody or visitation regardless of whether it's at the time of divorce or at another time.

18. Q. MY EX-HUSBAND HAS LEGAL CUSTODY OF OUR DAUGHTER. HE SAYS HE'S GOING TO TAKE HER OVERSEAS WITH HIM TO HIS NEXT ASSIGNMENT. CAN HE DO THAT?

A. Yes - Unless a judge orders him not to take her. A parent with legal custody can take a child with him wherever he goes to live in the absence of a court order prohibiting this.

19. Q. CAN HE GET A PASSPORT FOR HER? SHE'S ONLY 11.

A. The U.S. Department of State issues almost 1 million passports annually to children under 18. These passports are valid for 5 years (as compared to an adult passport which is good for 10 years). A new law regarding the passport applications of minor U.S. citizens under age 14 was implemented on July 2, 2001. Under this new law, a person applying for a U.S. passport for a child under 14 years of age must demonstrate that *both* parents consent to the issuance of a passport to the child, **or** that the applying parent has sole authority to obtain the passport. Exceptions to this requirement may be made in special family circumstances or exigent circumstances necessitating the immediate travel of this child. The purpose of the new requirement is to lessen the possibility that a U.S. passport might be used in the course of an international parental child abduction.

20. Q. HOW DO I GET A PASSPORT FOR A CHILD?

A. The application is available at domestic U.S. passport agencies and at U.S. consular offices abroad. Except in special circumstances both parents must sign the form if the child is under 14 years of age, unless the applying parent can prove they have sole authority to obtain the passport. For more information about passport application support in Bavaria, please contact your local passport section at the Personnel Support Battalion.

21. Q. IF I HAVE OTHER QUESTIONS, WHAT SHOULD I DO?

A. See a legal assistance attorney or private attorney as soon as possible. Your lawyer can answer many questions and help you to make a fair and intelligent decision about your choices, options and alternatives. Our legal assistance offices in Bavaria stand ready, willing and able to help you. Bring with you to the interview a copy of any documents or court papers that might be helpful to your attorney.